Supreme Court, U.S.
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NO.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

BERMAN J. WATTS.,

Petitioner,

vs.

MICHAEL P. W. STONE., Secretary of the Army; DEPARTMENT OF THE ARMY, Headquarters United States army Aviation Center and Ft. Rucker,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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89pp

QUESTIONS PRESENTED

I. Whether Appeal's Court *alteration of* issue so as to gut such issue's meaning and thus enable an accusation of lack of merit justifying dismissal is judicially improper and a violation of due process and equal protection of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

Such alteration includes systematically stripping the predicate or causal clause from the issues.

Such alteration includes the inversion of such issue to rule on issue wholly different than that raised.

II. Whether arbitrary avoidance of prior Standards of Review established by this Court, other Courts of Appeal and the Court from which appeal is taken denies the judicial function of the courts under Article III of the CONSTITUTION and due process and equal protection of law under the Fifth and Fourteenth Amendments to the Constitution.

LIST OF PARTIES

United States District Court
Judges

Myron Thompson

Truman M. Hobbs Jr.

Robert Varner.

Lt. Gen. Ellis D. Parker,
formerly Commander Ft. Rucker
subsequently Dir. Army Staff.
COL. Donald J.Marnon
Garrison Commander subsequently
retired.

Merit Systems Protection Board.
MSPB OfficeMSPB Office of the
Special Counsel .
EEOC,EEOCORA.
United States Army Civilian
Appellate Review Agency.
M. Cunningham, Administrative
Law Judge
David M. Smith, Chief U.S. Army
Litigation Civilian Employment
Branch, formerly Labor Counselor
at Ft. Rucker
Any Frisk
David Alfred, Asst. U.S.
Attorney
John Elder Wilson, U.S.
Attorney Montgomery, AL
Blaine King, present Labor
Counselor at Ft. Rucker.
F.H. Mayer, then Director of the
Directorate of Combat
Developments at Ft. Rucker since
retired.
C.H. Jacobus; Former Manager LHX

Division of The
Directorate of Combat
Developments subsequently
retired.

C.M. Waldran, Manager LHX
Division , Directorate of Combat
Developments
C.F. Auman, EEO
Officer,Ft.Rucker
J.B. Truss, MP
Charles Blakely, Supervisor,ORSA
DCD
Ronald D. Pfeiffer, a Supervisor
in DCD Ft. Rucker.
Ralph C. Fico, Aero Engineer DCD
R. Steele, Aero Engineer
Aircraft Development and Test
subsequently resigned and
employed by Bell Helicopter
Textron.
LTC. Sheehy Supervisor, Aircraft
Development and Test Activity
R. Wagg, President Army Aviation
Board

Employees and Staff

Directorate of Combat
Developments
Directorate of Engineering and
Housing
Army Aviation Center
Ft. Rucker, Alabama

Army Aviation Center
Ft. Rucker, Alabama

Bell Helicopter Textron; bidder
on LHX(Commanche)
and subsequent employer of
C.H. Jacobus as analyst

Individuals and/or Entities
having access to
suggestions made by Appellant
and subsequently
receiving award or implementing
suggestion.

Decision Making/Investigative
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BERMAN J. WATTS.,

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MICHAEL P. W. STONE., Secretary of the Army; DEPARTMENT OF THE ARMY, Headquarters United States army Aviation Center and Ft. Rucker,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Berman J. Watts, Jr. respectfully requests that a Writ of Certiorari issue to review the judgment

and opinion of the Eleventh Circuit entered in the above entitled proceeding on May 3, 1995.

OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported. A copy of that opinion is set forth in the appendix hereto beginning at page A-0.

The orders of the United States District Court for the Middle District of Alabama (Thompson, D.J.)is not reported. Copies of such orders are set forth in the appendix hereto beginning at page A-5.

JURISDICTION

Jurisdiction of the district court was invoked as follows:

1.pursuant to Title 28, U.S.C.§1331 and §1346 arising under the Fourteenth Amendment to the Constitution of the United States;

,2.pursuant to the provisions of Title 28, U.S.C. §1343, this being an action to redress deprivation of rights secured by Title 42, U.S.C.§ 1983;

,3.pursuant to Title 42 U.S.C Sec. 2000e. *et seq.* and 42 U.S.C. §1988, as a suit in equity , authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 U.S.C. ,*et seq.*, providing for injunctive and other relief against race discrimination.

The Middle District Southern Division Federal Court of Alabama was where such federal jurisdiction was invoked.

On appeal,invoking Title 28 §§1291,1292 jurisdiction the Eleventh Circuit affirmed the lower court

judgment on May 3,1995.

The jurisdiction of this court to review the lower court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Supreme Court Rule 10 (a) provides that a Writ of Certiorari may be granted:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter....or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

13A-11-8 (a)1a provides that:

Harrassment-A person commits the crime of harrassment if, with intent to harass, alarm or annoy another person he

a. Strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or

b.Directs Abusive or obscene language or makes an obscene gesture towards another person.

c. Harrassment is a class C misdemeanor.

(It should be noted that AL has a separate assault and battery statute whose consequent sentences activate the limit for a jury trial rather than a hearing before a magistrate of an accusation made and proffered in exchange for the dropping of employment discrimination complaint and administrative appeal)

STATEMENT OF THE CASE

Summary

This case arises out of the Eleventh Circuit Court of Appeals Decision Justifying the irregularities of the District Court's (Middle District-Southern Division at Montgomery , Alabama) **by the artifice of altering legitimate appeal issue , and it's meaning to a dismissable (and inaccurate) form.**

Introduction

The Appeals court erroneously restates virtually all the issues raised on appeal in such a manner as

to transform their meaning and thus enable conclusion that all claims raised were without merit.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE ISSUED

SUMMARY

A. Changes in the issues stated by the appeals court over those actually submitted on appeal and thus enabling dismissal - while consistently destroying the sense and reason of the actual issues raised - deny the Constitutional and common law basis of the judiciary and, the due process and equal protection Constitutional clauses of the Fifth and Fourteenth Amendments and other amendments that are fundamental to the American scheme of justice" *Duncan v. Louisana*,391 U.S. 145, 148-49,88 S Ct. 1444, 1446-47, 20 L.Ed.2d 491(1968). Property interest in employment is

directly affected as is plaintiff's standing and reputation in the community.

REASONS FOR GRANTING THE WRIT

The Panel's summation of the issues systematically and selectively rips out the heart cause from each issue. Each issue is thus transformed to justify a blanket dismissal that all claims lack merit.

Other issue's meaning is inverted - so that the panel makes negative ruling about the weight and sufficiency of evidence supporting a finding never made by the district court rather than the actual ruling plaintiff's issue raised.

By such means substantive, and any actual procedural due process is made impossible as is the functioning of such courts in regards to Article III of the Constitution. Under

the Fourteenth Amendment's due process and equal protection of law clauses such federal court is also bound. *Hurd v. Hodge* 334 U.S. 24,34-36."actions of federal Courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment prohibited".

Denial of the due process clause of the Fifth Amendment of the Constitution is also evident:

"it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." *Bolling v. Sharpe* 347 U.S. 497,500.

By such blanket dismissal and substitution of issue, the panel ignores the cited relevant standards of review violating procedural and substantive due process and equal protection in this Title VII matter by a member of a protected group who has been forced to

proceed pro se, and violating the principal of stare decisis. That is not the action extended to those represented by counsel exhibited in the published cases of the Eleventh Circuit Court of Appeals freely available for world wide observation.

A. *The Appeals Court's summation of each issue systematically excises the cause upon which such issue conclusion is based.* Thus the sense and reason of the issue is gutted.By such transformation any issue, regardless of reality, could be arbitrarily found without merit. Thus the due process and equal protection of law clauses of the Fifth and Fourteenth amendments of the Constitution are violated as extended to Federal Courts by *Hurd supra and Adarand Construction, Inc., Petitioner v. Federico Pena,Secretary of Transportation, et al.* Supreme Court No. 93-1841 (June 12,1995)

Part *IIIA*:

"The various opinions in *Frontiero v. Richardson*, 411 U. S. 677 (1973), which concerned sex discrimination by the Federal Government,took their equal protection standard of review from *Reed v.Reed*, 404 U. S. 71 (1971), a case that invalidated sex discrimination by a State, *without mentioning any possibility of a difference between the standards applicable to state and federal action. Frontiero*, 411 U. S., at 682-684 (plurality opinion of Brennan, J.); id., at 691(Stewart, J., concurring in judgment); id., at 692 (Powell,J., concurring in judgment). Thus, in 1975, the Court stated explicitly that -*[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.- Weinberger v. Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975); see also *Buckley v.Valeo*, 424 U. S. 1, 93 (1976) (-Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment-); *United States v. Paradise*,48 U. S. 149, 166, n. 16 (1987) (plurality opinion of Brennan, J.) *(-[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth-)*".

The implied due process in the other sections of the Constitution are also thus violated and an appearance of impropriety destructive of justice

made evident.

I.The Circuit's issue (1) is listed as district court judge error in not transferring the case to the Northern District of Georgia and ,(3) in not recusing himself.However such issue was termed in appellant's (petitioner's) brief as; "

(2)Failure to recuse and transfer venue prejudicial" in the index and at the actual argument title issue :

"Venue and jurisdiction were improperly obtained and denial of change of venue denies trial in unprejudiced forum."

Such predicate causes for such issue included the fact that such complaint was first filed in the Northern District of Georgia. Such issue also demonstrated that the cause of such prejudiced forum was so pervasive and fundamental as to preclude successful discrimination

complainants in such district against such employer. Further predicate cause of the issue was demonstrated judicial bias. Each and every such factual element was based on applicable precedent. Removal of the phrase "denies trial in unprejudiced forum" by the Panel thus destroys the original issue meaning to substitute an issue meaning that justifies dismissal as "lacking merit". The circuit panel repeats such pattern with subsequent issues.

Failure to recuse was predicated on cause. Chief among them was an influence of defendant's so pervasive in such economically backward area as to make finding of racial discrimination against such dependent forums an impossibility

despite the intensity of present discrimination as mirrored by monumental past savagery.

The lack of successful discrimination suit by black plaintiffs within the Middle District Southern Division of Alabama in any case involving Ft. Rucker AL.is telling. But when the effect of this facility on the regions economy, employment and thus pressure and influence is considered the cause resolves itself.

Ft. Rucker sprawls across a major portion of southeast Alabama and is unquestionably the single greatest economic engine and employer in the area. National taxes are siphoned through such post in the billions to support the otherwise moribund surrounding economies. Lack of sufficient economic alternatives is generated by

such communities' culture and tradition that subordinates merit, result and productivity to hierarchy, caste and race.

Distributing the merit system jobs as a "natural resource" on the basis of racial caste and political spoils cannot overcome the lack of certain skills developed in real economies yet even in such civil service hiring and advancement the racial caste system is imposed upon those imported to perform tasks the locals cannot.

The present "need" for such facility is without foundation and has been fraudulently maintained at a cost that includes considerable human life and that reduces the efficiency of this nation's fighting forces. Given such practice the violation of employment discrimination law and due process are

readily rationalized if not considered a positive good. Plaintiff appellant cited such fact and the support for it in the underlying appeal yet the panel, largely originating within or near such region takes the actions destructive of full and effective review of issues raised.

It should also be noted that Huntington who was involved in the original Employment discrimination suit (Southern district case (MOBILE)) against defendant subsequently died of natural causes. However the defendant's resources are vast and capable of causing physical harm by apparently natural means (for example forcing work under conditions of heat stress after determining one was taking medicine that elevated blood pressure, or exposing one to hazardous chemical contaminated

landfill vent areas, etc.).

It should also be noted that the accidental death rate for blacks in Coffee county (Enterprise is the dominant city therein.), the main bedroom community of Ft. Rucker is a multiple of the white rate.(AL. Vital Events for 1986).

Local prejudice as a cause for change of venue.

A historical racial prejudice is here abetted by a pecuniary interest on the part of inhabitants who are either employed by or related to those employed by the dominant employer of a dependent region. Defendant (Respondent) made blatant appeal to such prejudice by the uncontroverted production and circulation of accusation that the statement "white women need to be raped by black Men" was

in magazines by petitioner or was on papers that fell from his pocket. (Such effort was integral to the retaliation and discrimination during employment and was evidenced prior to three of the administrative complaints and appearing therein not just prior to a hearing on an initial suspension as erroneously limited and claimed as " Plaintiff advocated Rape" in the underlying District court Summary judgment order (APX 27)). Indeed Respondent admits that plaintiff was tailed and communication made to those outside of employment so as to imply criminality and stir racial animosity based on stereotype.
Written communication on the stationary of the commander (Parker) of Ft. Rucker contains the written in notation to make a nonexistent charge of assault stick
Only then were charges of "Harassment "

made by which mere touch is made criminal if the accuser testifies it's purpose is to harass, alarm or annoy. Such prosecution further reduced the impartiality of that forum with respect to Appellant. In *Crowell-Collier Pub. Co.v. Caldwell 170 F2d 941 (5th Cir 1948)* a district court denial of a motion for change of venue was reversed,remanded and recommendation made that venue be transferred based on evidence of appeals to local prejudice made by the Appellee both before and at trial.

II.The second part of the "judicial error" of the panel's issue 4) is "... and dismissing others (issues) as improperly brought under inapplicable statutes" Such issue was addressed as issue (6) of appellant-plaintiff's brief as to 'Whether the partial summary

judgment had sufficient legal and factual basis.

Title VII is not exclusive remedy where Defendant's actions extend beyond employment. The de novo standard of review was expressed as applicable. Such claims applied to 42 U.S.C.§ 1981 with regard to misevaluation and improper rejection of suggestion later found workable and or being avidly pursued and developed by Defendant-Appellee after driving plaintiff from employment and maintaining a blacklist.Complaint under 42 U.S.C. § 1985 involved the offer of withdrawal of criminal accusation made at an atypically located dismissal letter delivery,thus limiting witnesses to themselves and including an armed man primed with a false story of appellant's prior "violence" at appellant's back who acted

as if mere normal movement was a prelude to an attack. Such offer was made if plaintiff appellant would abandon the pending Merit system appeal and EEO complaints. Federal officials acting under "color a "state statute" was the root of this ultimate cause under such statute.

III. The other portion of the Panel's issue 4) is [the district judge] committed error in granting summary judgment to defendant's on some complaint issues (actually all but two) on the grounds of res judicata and mootness. The admitted, documented, exposed and unique stripping of promotion potential from the job when appellant entered it was unnecessary to the prior case used as a res judicata basis to deny the inclusion of such issue. Moreover neither

mootness nor res judicata citations establishing prior opposite precedent by this court, it's peers and superior, are negated by later overriding citation but only by the panel's bald inaccurate restatement allowing negation.

The order relied upon for such summary judgment also raises an issue of resolving a "promotion potential" issue in a prior case that involved a dismissal and termination that occurred prior to the completion of the administrative processing of the complaints forming the basis of the subject complaint. Plaintiff never requested a resolution of whether the individual act of removing promotion potential was in and of it self discriminatory. Plaintiff's attorney then expressly , as plaintiff has repeatedly indicated, presented such action as a

pattern of adverse, detrimental actions taken solely against blacks and those who filed discrimination complaint exhibiting timing and escalation that would ideally serve a discriminatory/retaliratory purpose. As such, individual finding of such element as disseminator was unnecessary to the prior decision and thus

a res judicata reliance on such issue baseless. (App 3,Reduction of promotion potential, failure to promote).

IV. The Panel's decision cites the fifth issue as: that the district judge committed error; in evidentiary rulings whereas appellant(s) brief (issue (1) cited as basis for such improper exclusion and inclusion of evidence as;

"i. A pattern of denying inclusion of evidence crucial to proof of discriminatory intent including the denial of evidence similar to that admitted in other cases since such time where plaintiff's were white."

Improper exclusion of evidence includes a court order denying motion for discovery crucial to the demonstration of discrimination by circumstantial evidence. Basically by essentially demanding direct evidence only of discriminatory intent of elements of an ever detrimental and only applied to minority series of actions, the evasion of proof of discrimination is enabled. If criminal conviction is enabled by testimony of other as to what is in one's mind so as to convert mere touch into the crime of Harassment (Touching or striking another with the intent to harass annoy or alarm) despite such black individual's testimony that he merely sought to gain attention of one who was signalling to an MP with a Gun behind one's back, how is it that the entire series of actions against

Watts displaying an ever more destructive effect, building upon each complaint of such prior activity, require that intent of discrimination be established only by the statements of those committing the acts against him with regard to issues narrowed by the court on a arbitrary and selective manner?

Other discrimination cases by such judge, since such trial and prior to the filing of the Appellant's brief, showed cases where such evidence was admitted in the case of white complainant's of discrimination. Plaintiff cites these cases in the initial brief along with the inclusion of such evidence. Yet, that issue here is thus craftily evaded by restating the issue to exclude such predicate.

Overwhelming statistical evidence of discriminatory enforcement of adverse action as penalty against accused blacks

but not whites was excluded as regards discriminatory intent and environment. Excluded evidence included statistical indications of overwhelming use of accusation of "misconduct" and "crime" for adverse actions against blacks as compared to whites to a .99 probability or three standard deviations. PX.38.

Improper limitation of discovery included abetting defendant's fantastic claim that computer records of reimbursements form 1588's had been destroyed due to repeated computer error. This is despite the fact that backup of computer data and programs has been an industry wide practise for decades before such time and despite the fact that such record catalogs the flow of millions in travel expenses, temporary duty and relocation expenses.

Thus, all but two of the involved issues raised on appeal were so

drastically "summarized" as to erase their original meaning. By such means any, issue could be thus claimed to appear as lacking merit. Due process and equal protection of law, not capricious and arbitrary summary elimination, are the Constitutional and thus any just Nation's judicial requirements. Techniques for the evasion of such protections threaten not just traditionally discriminated against minorities but all.

Such rulings should be stricken, the actual issues actually and accurately considered and addressed and , in light of the evidence, the district court decision should be reversed and the relief sought ordered.

B. *Circuit panel finding based upon erroneous inversion of issue with regard to parties and burdens improperly excludes the actual issue raised.*

Such action would permit the arbitrary destruction of actual issue raised by appellants to issue not raised, but destructive of such appellant's position. Denial of the due process clause of the Fourteenth Amendment and equal protection of law is enabled by such "error" as is an appearance of impropriety destructive of justice.

The Panel cites it's sixth issue as error by the district judge in finding that petitioner failed to introduce sufficient evidence to prove a case of discrimination on the basis of race or retaliation. No such district court finding was made! Consequently no such issue was possible. The actual issue is thus evaded and due process denied. Petitioner's brief actually states at issue 4) Insufficiency of the evidence:

"Weight and Sufficiency of the evidence supporting the conclusions (district court's) lack adequacy."

Such issue is reassessed in regards to the summary judgment issue also. Thus , clearly the Panel has committed error in stating that it's issues 6 was an issue raised by plaintiff petitioner as to the sufficiency of evidence introduced by petitioner to prove a case of discrimination or retaliation rather than the actual issue (3) concerning the weight and sufficiency of the evidence for the district court's conclusions of law and fact in accepting defendant's articulations for different treatment. Such ruling should be stricken , the actual issue considered, and in light of the evidence , held as grounds for reversal.

C.Arbitrary avoidance of prior precedent as to accepted standard of review denies

due process and the basic principle of stare decesis.

Despite petitioner's inclusion of the customary standards of review for this circuit in appellant's briefs, the Panel's decision cites a "review of the record" as the "standard" for its generalized decision that the issues as recast free of their basis by the Panel, are without merit.

I. Issue 1 as recast by the court ignores the cited Standard of review in plaintiff's appellant's brief(s) issue (2). The cited standard of review Is "based upon covalent statutory and Constitutional grounds and the included issue of recusal. Therefore a de novo examination of *Whether there is an appearance of impropriety* as established in *Liljeberg v. Health Services Acquisition Corp.*486 U.S. (1988) is appropriate.

II.Issue 4(partial) as recast by the Panel ignores the cited Standard of review in plaintiff's appellant's brief(s) original issue 6, which is de novo review under the involved the partial summary judgment.

III.Issue 4(partial) as recast by the Panel ignores the cited Standard of review in plaintiff's appellant's brief(s) original issue 6, which is de novo for the involved partial summary judgment.

IV.Issue (4) as recast by the Panel ignores the cited Standard of review in plaintiff's petitioner's brief original issue (1):"Substantive due process denial by improper exclusion and admission of evidence." The arbitrary application of evidence standards requires a de novo or plenary review. The

broader standard is invoked by the effect upon substantive due process, and an error that if uncorrected would be an affront to the integrity and reputation of the judicial proceedings. Mike *Ousley Products, Inc. v. WJBF-TV*,952 F.2d 380 (11th Cir. 1992).

V.Issue (5) ,as recast by the Panel, ignores the cited Standard of Review in plaintiff's appellant's brief issue 3: Insufficiency of the evidence for the Court's conclusions of law and fact. Such standard was:

"In consideration of the disparate weighting of evidence and consequent results in comparing discrimination cases involving black plaintiffs with those involving white plaintiffs by the involved judge it is apparent that "plain error" doctrine is invoked. The doctrine encompasses errors that are obvious, that effect substantial rights of the accused (in this case a black employment discrimination complainant in such region is similar to and accused, or will if he remains there long enough , become one) and that , if uncorrected, would be an affront to the integrity and reputation

of the judicial proceedings. *MIKE Ousley Productions, Inc. v.WJBF-TV* 952 F.2d 380 (11th Cir. 1992)."

Issue Conclusion

Essentially the Circuit panel comes closest to stating a "standard" of review as,"review of the Record" for all issues. Thus precedent established by this court, it's peers and superior with regard to standard of review is admittedly ignored.Equal protection of law and due process are denied when some are permitted the protections and process based upon prior precedent and others are denied. Thus as an unconstitutional and unlawful deprivation, such Panel ruling should be vacated, the proper standards applied and , in light of the evidence, the district court judgment reversed and the relief sought ordered.

CONCLUSION

If a court of appeals may thus remove the critical causal parts of a series of issues in such a way as to dismiss them and evade it's own standards of review and, ignore precedent, this Court faces a rebellion aimed at the destruction of substantive and procedural due process, and congressional intent "fundamental to the American scheme of justice."

Moreover, misconduct thus protected extends to violation of law by the very entity charge with enforcing such law and aids in perpetuating a racial caste based distribution of productive result that has crippled the economic base of the involved state and poisons the effectiveness of national resources channeled through such otherwise economically moribund state region in the name of defense.

But a deadlier result is apparent. Where government attorney's may freely falsify citation and precedent and have the courts persistently (if supposedly unintentionally) avoid not only sanction but even analysis by denying review based upon a series of ever negative decisions not only the appearance but even any alleged fact of justice is impossible. It is not sufficient that respondent has all the vast resources of the government at it's service. Deceit also must be called and it is not to be assessed by the judiciary. Nor is the question of what occurs outside the courtroom with such power to be questioned despite open violation of law and "conviction" based upon incident where witnesses were deliberately limited, the threat of lethal force was justified by deceit and petitioner is

accused of striking one of three of an armed party with an armed man (45 Auto) at his back in a region where one of the leading causes of death among young black men is homicide and the candidly included cause "legal intervention". Alabama's. Vital Events for 1986.pp 181.

The proceedings in these affairs represent a cover-up of a tiny portion of a persistent and enduring evil of racial suppression based upon force backed by deceit masquerading as the rule of law. Indicating such affairs are; "accidental death rates" for nonwhites that are multiples of the white rate in FT. Rucker's bedroom community of Coffee county; Higher premature death rate and turnover among blacks in positions beyond the glass ceiling as maintained by local promotions at the GS-09 level; Premature death, health problems and turnover

among blacks involved in discrimination or retaliation complaint and; the fact respondent at Ft. Rucker is undoubtedly the single greatest area economic engine of an otherwise moribund economy making civil service positions a natural resource to be distributed based on a racial caste system.

Such a state region's people most revere an assumed prosperity that existed when it operated on a race and caste based distribution of reward rather than production and result. Therefore, massive deconstructive effort directed towards the minimization of the enterprise and income of certain portions of the population so as to maintain a distribution of reward based on race and caste rather than merit continues. Massive effort towards diversion and destruction of productive effort is so

costly that the area has never reached the point of producing more than it consumes. Thus vast military posts provide a means of transferring national income to such area. But going into an area that substitutes reward based on caste for reward based on effective innovation and production - the billions thus transferred would be better spent in an area that has a history of enterprise and growth as measured by a diversified and resilient growing economy. Only by such means can investment be allocated in such a way as to maximize the growth and resilience of the national economy in an increasingly competitive world. Why should the Nation subsidize an outmoded and destructive racial caste system that has repeatedly subverted new law within a few decades of it's inception? Why in violation of it's own canons

and the interests of the nation it purports to serve should a judiciary shield such deliberate and enthusiastic destruction and waste? How can an employer so dominant in so poor an area not exert so pervasive an effect upon all who dwell therein so as to not bias any judicial decisions involving respondent? Perhaps such answer accounts for the fact that the successful discrimination suits against Ft. Rucker have been brought in districts other than the Middle District Southern Division of Alabama and by Appellate Court Panels not dominated by those originating within or nearby such region.

CONCLUSION SUMMARY AND REMEDY

For the foregoing reasons, petition for certiorari should be granted. The decision by the involved panel should be

reversed or voided. The actual issues raised on appeal should be given full hearing and the underlying decision reversed so that the requested relief is granted.

Respectfully submitted,

_____

Petitioner,
Plaintiff-appellant

1. IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-6538
Non-Argument Calendar-

D.C. Docket No. CV 91-T-144-S

BERMAN J. WATTS, JR.

Plaintiff-Appellant

versus

MICHAEL P. W. STONE,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

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Before KRAVITCH, ANDERSON ans CARNES, Circuit Judges.

PER CURIAM:

Berman J. Watts appeals the action of the district court dismissing certain claims, granting defendant's motion for summary judgment on other claims, and entering judgment in favor of defendant in Watt's civil rights suit against the secretary of the Army and the Department of the Army. Watts alleges that the defendants discriminated against him on the basis of his race and in retaliation for Watts' having filed administrative

charges of discrimination. On appeal, Watts raises numerous issues including claims that the district judge erred: (1) in not transferring the case to the Northern District of Georgia; 92) in ruling that the Civil Rights Act of 1991 did not retroactively apply apply to his pending claims;(3) in failing to recuse himself; 94) in granting summary judgment to defendants on certain issues on the grounds of res judicature and mootness and dismissing others as improperly brought under inapplicable statutes; (5) in evidentially rulings; (6) in finding that plaintiff failed to introduce sufficient evidence to prove a case of discrimination on the basis of race or retaliation.

Based upon review of the record, we conclude that all of appellant's claims are without merit.

AFFIRMED.

2 ISSUES RAISED BY APPELLANT"S BRIEF

I. STATEMENT OF THE ISSUES

1. Whether evidence was improperly excluded, and whether evidence was improperly admitted.

A. Statistical evidence of disparate impact discrimination was relevant to the claims and was excluded or not considered.

B. Evidence indicative of a discriminatory environment was improperly excluded.

C. Whether plainitiff's discovery was improperly and inequitably limited.

2. Whether a forum wherein defendant is the overwhelmingly dominant employer and where no employment discrimination case has successfully been litigated against defendant despite abundant and historical fact of racial animus destructive of blacks is so prejudiced as to deny any possibility of substantive due process in matters of employment discrimination against such employer by anyone of plaintiff's race? (Included therein is the subsidiary question of mandatory recital on the same basis and on demonstrated prejudice.)

A. Plaintiff first filed in the Northern District of Georgia and in any subsequent filing in the Middle District of Alabama sought a change of venue to avoid the demonstrated prejudice of the MIddle District of Alabama.

B. Maintenance of the Middle District Southern Division of AL or any Alabama forum denies substantive due process in Title VII actions involving the sparse major employers in such regions.

C.Substantive due process is denied and statutorial requirement evaded by the judges demonstrated bias, the common and or direct pecuniary interest the subject matter and in Defendant's widespread economic support of such venue's otherwise moribund economy.

3.Whether.evidence was sufficient to support the judgement.

4.Whether 42 U.S.C. §§§ 1981,1983, 1985 claims are applicable to discriminatory acts extending beyond normal federal employment including improper denial of contracted proprietary rights and action to deny 5th and 14th amendment rights of substantive and procedural due process under color of state law wielded by federal officers.

5. Whether the Civil Rights Act of 1991 is applicable to cases involving government employees and former government employees that were pending at the time of such law's enactment. Applicability of the Civil Rights Act of 1991 to the subject pending complaint/appeal is not negated but is inherent in the recent *Landgraf v. USI Film Products* No. 92-757 (APP1). Lack of retroactive effect was predicated on the impairment of *private* rights and liabilities in the absence of a specific retroactive clause in such law whereas the subject case involves a public malefactor who by it's very nature cannot enjoy any such *private* rights and liabilities.

6. Whether the district court's summary judgment order had sufficient basis in law and fact

3. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

BERMAN J. WATTS, JR., Plaintiff,	)	
v.	)	CIVIL ACTION NO. 91-T-146-S
MICHAEL P. W.STONE, et al., Defendants.	)	

ORDER

In accordance with the findings of fact and conclusions of law made in open court on February 3, 1993, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That judgment is entered in favor of defendants and against plaintiff Berman Watts on plaintiff Watts's claims regarding 1985 overtime pay and travel vouchers, with plaintiff Watts taking nothing as to said claims;and

(2) That plaintiff Watts's claim regarding overtime pay between May 1982 and late 1984 is set for an evidentially hearing on March 19,1993, at 2:00 p.m. in the second floor courtroom of the Frank M. Johnson, Jr., Federal Building and United States Courthouse in Montgomery, Alabama, with the parties to file briefs by March 17, 1993.

Done, this the 5th day of February, 1991.

Signed
Myrom Thompson

UNITED STATES DISTRICT JUDGE

4. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

BERMAN J. WATTS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	91-T-146-S
MICHAEL P. W.STONE, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff Berman J. Watts, Jr. a black person, formerly employed by the United States Army as a civil servant, has brought this lawsuit against defendants, the Secretary of the United States Army and others. Watts claims that the Army discriminated against him because of his race and retaliated against him for filing discrimination complaints, in violation of 42 U.S.C.A. §§ 2000e through 2000e-17, popularly known as the Civil Rights Act of 1964, as amended. The court has jurisdiction of Watts's claim pursuant to 42 U.S.C.A. 2000e-5(f)(3). Previously in this litigation, the court found against Watts on all of his claims except one: that between May 1982 and 1984, he was denied overtime pay for discriminatory and retaliratory reasons. Based upon the evidence presented, the court concludes that Watt's remaining claim also lacks merit.

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*This claim is the last of a lenghty series of claims presented in this lawsuit and in others brought by Watts.

In its finding of fact and conclusions of law filed on February 5,1993, the court set forth the analytical framework for determining whether a person had been a victim of discrimination or retaliation. The court applies the same framework to Watts's remaining claims of discrimination and retaliation.

Between 1982 and 1984, Watts was not denied overtime pay either because of his race or because he had filed complaints of discrimination. During this time , the policy applicable to him and others was that overtime pay was not encouraged and that compensatory time was used where possible. However, where overtime pay was necessary, it had to be preapproved. This policy was applied to all in a nondiscriminatory and nonretaliratoey manner. For much of 1982 through 1984, Watts did not have the type of responsibility that required that he work overtime, as a result, he was not called upon to work overtime. Furthermore, for those instances in which he did work overtime, he was paid for it. There was no time which he worked overtime but was denied overtime pay. Neither race nor retaliation was a substantial or motivating factor in the application of the overtime pay policy to Watts.

The court also finds to be without merit Watt's contention that he was denied information about overtime pay or that he was misinformed about overtime pay for discriminatory and retaliratory reasons. To the extent Watts may have been misinformed or denied information, it was by accident and not because of his

race and not out of a desire to retaliate against him.

5.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

BERMAN J. WATTS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	91-T-146-S
MICHAEL P. W.STONE,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff Berman J. Watts is a frequent litigator who appears to devote most of his waking hours to the pursuit of claims in this court and before various federal and administrative agencies. In this latest lawsuit, Watts charges that the United States Department of the Army discriminated against him because of his race and because he had filed administrative charges of discrimination against the Department. Watts claims violations of the following: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. A. §§ 2000e through 2000e-17; 42 U.S.C.A. §§1981 and 1985; and the fifth and fourteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. § 1983. Watts has named as defendants the Secretary of the Army. He has invoked the court's jurisdiction under 42 U.S.C.A. § 2000e-5(f) and 28 U.S.C. U.S.C.A. §§ 1343 and 1331. This cause is now before the court on the

defendants' motions to dismiss and for summary judgment.

EOD 4/9/92

For the reasons that follow , the court concludes that defendants' motions are due to be granted in part and denied in part[1].

I. FACTUAL BACKGROUND

A. Watts's Four Administrative Claims

Watts began working for the Department of the Army as a civilian aerospace engineer in May 1982.During much of his time at the Army, he was the only black professional engineer working in his division. Between August 1985 and August 1986, Watts filed four discrimination claims with the Equal Employment Opportunity Commission ("EEOC"). This lawsuits based on the incidents described in these four administrative claims.. The first claim, filed in August 1985, alleged that the Army had discriminated against Watts in the administration of Job Performance standards.[2] This claim also alleged that Watts had been required to take "compensatory time " for his overtime hours after being told that were no funds available for overtime work, although he subsequently learned that another employee had been paid for overtime. The claim also alleged that Watts had suffered retaliation for earlier EEOC

1.By order entered today, the court has granted several motions filed by Watts on July 12 and 18, 1991, and on January 6, 1992, seeking to amend his complaint, to add claims under § 1985, and to include

the 1991 Amendments to the Civil Rights Act as an additional basis of relief. In granting the defendant's motions, the court has considered Watts's complaint as amended in all of the above respects.

2.This first complaint actually consists of two complaints , filed in August and December 1985, which were investigated and processed jointly. This court follows the EEOC in treating these as a single complaint.

claims he had filed in 1984 and included additional allegations pertaining to the terms and conditions of employment. [3] The second claim, filed in February 1986, alleged that the Army discriminated against Watts when it reduced the promotion potential of his job and when it deducted from his paycheck an amount to cover a travel voucher that he claimed he had already settled. Watts also claimed that the Army had delayed processing his travel voucher in retaliation for his EEOC claims. The third claim, filed in May 1986, alleged that the Army discriminated against Watts on the basis of race and retaliation when it suspended his library privileges. This claim also included other allegations regarding various terms and conditions of his employment. Finally the fourth claim, filed in august 1986, charged the Army with discriminatory suspension of his security clearance.

Before any of these claims were resolved administratively, however , Watts became involved in a number of other incidents at work which led to his temporary suspension in August 1986 and his dismissal in June 1987. Watts appealed his termination the Merit System Protection Board, charging the Army with unlawful race discrimination and retaliation for his EEOC claims. In October 1987, the Board rejected his discrimination and retaliation claims and affirmed his termination grounds that he

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3.The EEOC complaints Watts filed in January and February 1984 are not at issue in this lawsuit

had engaged in conduct unbecoming a federal employee by striking his supervisor.

B.

Watts's First Federal Lawsuit

In 1988, after his claim was denied by the Merit Systems Protection Board, Watts filed suit in federal court. First , he charged that both his termination and the earlier suspension were discriminatory and retaliratory in violation of Title VII and, second, he sought general review of his termination pursuant to 5 U.S.C. A. §§7702, 7703. This court rejected his Title Vii claim and found that the Army had presented legitimate nondiscriminatory reasons for his termination and suspension, including the allegation that Watts had struck a superior officer. The court, however, remanded his second claim, which did not implicate and discrimination or retaliation charges, on the procedural ground that the board had erred in denying him the opportunity to present his side of the hitting incident which led to his dismissal. Watts v. Marsh, No. 87-I-804-S (M.D. Ala. June 20,1989) (Thompson, J.). Watts appealed the district court judgment to the Eleventh Circuit Court of Appeals but that court dismissed the appeal for lack of jurisdiction, holding that the district court's order remanding the action to the Board was not a final order and therefor was not appealable. Watts Marsh, No. 88-7511 (11th Cir. July 26, 1989). Two years later, in March 1995, after administrative denial of his remanded claim Watts again sought review in the

Eleventh Circuit but the court again dismissed his appeal for lack of jurisdiction because he had not first sought further review of the remanded claim in the district court. Watts v. Marsh, No. 90-7754 (11th Cir. Mar 18, 1991).[4]

C. Watts's Second Federal Lawsuit

In 1989, while his appeal of his first federal lawsuit was pending, Watts filed a second federal lawsuit again challenging his discharge but relying on a theory of "constructive" discharge. This court found that the issue and incidents discussed in the complaint had already been presented to a court in Watts's first lawsuit. Watts v. Marsh, No. 89-H-444-S (M.D. Ala. May 11, 1989) (Hobbs, J.). Watts twice requested the court to reconsider its ruling , but with no success. His appeal to the Eleventh Circuit was similarly unsuccessful. Watts v. Marsh, No. 89-7546 (11th Cir. June 26, 1990).

D. The Administrative Resolution of WAtts's Four Discrimination Claims

At the time Watts filed his first federal lawsuit, his four discrimination claims filed in 1985 and 1986 had not yet been resolved administratively. Although these claims had been pending before the EEOC for well over 180 days, he did not seek to include these claims in his

4. Watts is now pursuing a third appeal. Watts v. Marsh, No. 92-7860 (11th Cir.).

federal lawsuit.[5] In August 1988, after this court's resolution of Watts's first lawsuit, the Civilian Appellate Review Agency issued a final decision rejecting these four discrimination claims. The agency concluded that Watts's filing suit in federal court had canceled further administrative proceedings. The Agency also found that, because Watts had been terminated , no relief could be granted even if the Agency were to continue processing the claim.

Watts appealed the Agency's decision to the EEOC and successfully persuaded the EEOC to vacate the decision. Watts's argued, and the Commission agreed, that his federal lawsuit was based solely on the issue of his termination and not on the incidents raised in these claims, and therefore was not res judicature with respect to these claims. The Commission also noted that since the Merit Systems Protection Board's decision affirming Watts's discharge had been remanded for reconsideration, there was still a chance that Watts could be reinstated and relief granted.

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5. Watts also had two additional discrimination complaints filed in October 1986, still pending before EEOC at the time he filed suit challenging his termination. Watts did not include these claims in that suit; instead, he sought to initiate a second federal lawsuit based on these two complaints after he had exhausted his administrative remedies. He moved to proceed in forma pauperis and for appointment of counsel but the district court denied both requests. The court found that the issues

and incidents discussed in the complaint had already been presented to a court in Watts ' earlier lawsuit over his termination. Watts v. MArsh,No. 89-h-444-S (M.D.. Ala. May 11,1989). Watts twice requested the court to reconsider its ruling , with no success. His appeal to the Eleventh Circuit Court of Appeals and his petition for certiorari were similarly denied. Watts v. Marsh, No. 89-7546 (11th Cir. June 26,1990); Watts v. Marsh No. 90=1308 (Sup. Ct. 1991).

In March 1990, almost four years after Watts first filed these four claims, the Civilian Appellate Review Agency issued its second final opinion, again rejecting Watts's four claims of discrimination and retaliation. The Agency again relied on Watts's federal case as res judicata for his discrimination claims. However , by this time the Merit Systems Protection Board had confirmed Watts's termination. The agency therefore reasserted that, even if Watts were to prevail on his claims, he would not be entitled to any equitable relief available under Title VII. It therefore declined to continue processing the claims.

Watts appealed and, in 1991, the EEOC, after issuing a decision and later reconsidering it, rejected all of Watts's claims except for two. These two issues concerned the delay in processing Watts's travel voucher payment and the use of compensation time instead of overtime pay. The Commission concluded that , if proven, these allegations would represent tangible losses which could be remedied despite Watts's termination. The Commission remanded these claims for further processing.

The Commission concluded that one of the other claims, the promotion-potential issue, had already been resolved with the district-court decision in the first lawsuit which found that the Army did not discriminate against Watts when it reduced the employment potential of his position. With respect to the other claims, the Commission concluded that they pertained to the terms and conditions of his employment and, because Watts was no longer employed by the Army,

had been properly rejected by the Civilian Appellate Review Agency.

E. The Current Federal Lawsuit

In his third federal lawsuit, Watts raises claims based on the incidents described in the four administrative claims Watts filed in 1985 and 1986. He charges the Army with discrimination and retaliation with regard to following actions; (1) reduction of the promotion potential of his position; (2) denial of promotion, and maintenance of a racially discriminatory promotion policy; (3) suspension of his security clearance, and monitoring of his personal phone calls; (4) harassing him and spreading inflammatory rumors prior to his termination hearing; and (5) constructive discharge. He also seeks to challenge his discharge as (6) a violation of his "substantive" and "procedural"due process rights. Watts rest his complaint on Title VII, § 1981, § 1985, and the Fifth and fourteenth amendments as enforced through §1983.

II. DISCUSSION

As stated , the defendants have filed with the court both a motion for summary judgment and two motions to dismiss. The court turns to the summary judgment motion first.

A. Motion for Summary Judgment

The applicable standard. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where' "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a

matter of law."Once the party seeking summary judgment has informed the court of the basis for its motion and identified those undisputed facts necessary to support its claims , the burden shifts to the nonmoving party to call evidence to the attention of the court sufficient demonstrate a "genuine issue of material fact" as to at least one element which the moving party will have to prove at trial. Celotex corp. v. Catrett,477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). See also Tidmore Oil v. BP Oil Co.,/Gulf Prods. Div.,932 F.2d 1384, 1387-88 (11th Cir. 1991). A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52, 106 S. Ct. 2505, 2510, 2511-12 (1986). If the evidence favoring the nonmovant may not rest on his allegations in her pleadings but must supply or identify in the record probative evidence which tends to negate a part of the movant's case or support an affirmative defense. See Celotex Corp., 477 U.S. at 324, 106 S. Ct.. at 2553. In this circuit however, " the disposition of an employment discrimination case by summary judgment should be used cautiously" Beard v. Annis, 730 F.2d 741, 743 (11th Cir 1984) (per curiam). "Nonetheless, summary judgment may be entered if the plaintiff fails to raise any issue of fact indicative of racially discriminatory conduct by the defendant." Id at 743-44. Of course , the court makes this determination by viewing the evidence " in the light most favorable to the non-moving party." Early v. Champion Int'l Corp.,907 F.2d 1077,1080 (11th Cir

1990): see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Applying these principles, the court concludes that the defendants are entitled to summary judgment on all but two of Watts's claims.

Reduction of the promotion potential of Watts's position. Watts claims that the Army discriminated and retaliated against him when it reduced the promotion potential of his position. The defendants contend that the district court decided decision in the first lawsuit finally decided this claim and that Watts is therefore barred by the doctrine of res judicata from relitigating the issue.

A federal court applying the doctrine of res judicata looks to the law of the state in which it sits. NAACP v. Hunt, 891 F.2d 1555 (11th Cir 1990). Under Alabama law , res judicata will apply where each of the following four elements are present; "(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identities of the parties, and (4) with the same cause of action presented in both suits.' Id. at 1560 (quoting Hughes v. Allenstein, 514 So. 2d 858 (ala. 1987)).

Here, all circumstances involving Watts's suspension and termination were resolved in his first federal lawsuit--either in the court's initial decision, on remand, or after remand. It is also apparent that the defendants in Watts's first suit are the same as the ones in this suit: the United States Department of the Army and the Secretary of the

Army. The only question , therefore, is whether this particular claim was presented in the first suit.

Although watts's first suit focussed on his claims of discriminatory and retaliratory suspension and dismissal, the court also heard evidence in connection with his claim concerning the reduction of the promotion potential of his job. In support of his contention that his suspension was part of a pattern of discrimination and retaliation, Watts expressly submitted this claim to the court for resolution. The court then explicitly found that the Army did not discriminate or retaliate against Watts when it reduced the promotion potential of his position. Watts is not entitled to a second bite at the apple on this claim.

Watts contends that res judicata does not apply because resolution of his promotion-potential claim was not necessary to the resolution of his first lawsuit. Watts apparently overlooks the fact that , in seeking to rebut the legitimate , nondiscriminatory reasons put forth by the Army to explain his suspension and termination, he bore the burden of establishing that the Army's proffered justifications were a mere pretext or that a discriminatory or retaliratory reason more than likely motivated the Army officials responsible for his discharge. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05, 93 S. Ct. 1817, 1825-26 (1973); Watts v. Marsh, No. 87-T-804-S (M.D. Ala. June 20, 1988). The allegations of discrimination and retaliation based on incidents involving library materials and computer discs as well as the claim

regarding the promotion potential of his position were all examined by the court in order to determine whether Watts had established that the Army acted toward him with discriminatory intent. Indeed, as stated above, Watts himself asked the court to resolve the promotion potential claim as necessary to the resolution of his charge that his suspension and discharge were illegal. If the court had not reached the claim , Watts surely would have contended that the court erred. The resolution of his promotion potential claim was necessary to the resolution of his suspension and termination claim.

Failure to promote. Watts seeks recovery on the ground that the Army failed to promote him because he is black. He contends that this is part of an overall Army pattern or practice of denying promotions to black employees . First, it appears that this precise claim was never presented to the EEOC. In any event , however , this claim is simply a restatement of his claim that the Army discriminated against him by reducing the promotion potential of his position .[6] As discussed above , the district court has already examined this claim and rejected it.. Further pursuit of this claim is therefore barred by the doctrine of res judicata.

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6. In his brief in opposition to the defendant's 'summary judgment motion , Watts provides the following explanation of his complaint about the army's discriminatory promotion procedures;
'[The Army} arbitrarily lower[ed} the grade of the job plaintiff entered from

GS-12 to Gs-9 and fix[ed] the grade at that level... so as to prevent the promotion potential normal for whites of lesser accomplishment.'

P1. Affidavit and Brief at 3 (filed July 12,1991). This claim is inseparable from Watts's previous complaint concerning the reduction of his position's promotion potential.

Claims of discriminatory and retaliratory treatment at work.
Watts lists numerous incidents of discrimination and retaliation he claims he experienced while working for the Army, including: the suspension of his security clearance; lack of notice about meetings: defamation; the use of subjective performance ratings; and discriminatory denial of travel and temporary duty time that was freely granted white employees. Having reviewed all the incidents , the court concludes that these claims are either barred by res judicata or , due to Watts's discharge, have become moot.

First, Watts's is barred from relitigating the issue of his security clearance. Watt's security clearance claim raises issues identical to those implicated in the subsequent suspension and termination of his employment: for improperly removing over 100 computer discs from the office, and for carelessly handling library materials . In his lawsuit over his employment suspension , Watts challenged both these reasons are mere pretexts for discrimination. This court rejected that claim , finding that the taking and the carelessness were "obviously improper,and that the agency's decision to discipline an employee who engaged in such conduct was reasonable.Watts v. Marsh,No. 87-T-804, slip op. at 6 (m>D. Ala. June 20,1988). At that time , the court examined all the evidence presented by Watts and found no support for his claim that the Army's actions were tainted by a discriminatory or retaliratory motive . Watts may not now seek to have this court review the identical evidence and resolve the same

issues that have already been considered and rejected. Miller v. United States Postal Serv., 825 F.2d 62, 63 (5th Cir. 1987) (plaintiff may not assert serially claims that could have been litigated together). {note added - clearance restored by higher authority, Oct 87}

Similarly, Watts's claim in this litigation that he was unfairly disciplined for removal of library books was litigated and resolved in the first law suit. The court rejected this claim and found that there was no evidence of discriminatory or retaliratory motive in the Army's decision to discipline Watts regarding carelessness with library books.

Finally , the preceding claim s as well as his remaining claims are moot. The remedies available to a Watts are limited to reinstatement , with or without backpay, and other equitable relief. See. e.g .42 U.S.C.A.

2000e5(g); Walker v. Ford Motor Co., 684 F.2d 1355, 1354 (11th Cir. 1982). Because Watts is no longer employed with the Army , and because he is no longer entitled to reinstatement or backpay, and because there is no reasonable probability that he will be rehired by the Army, there is no relief the court could afford him on these claims. Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136 (11th Cir. 1986) (injunction unavailable where plaintiff no longer employed by defendant and not seeking reinstatement); Backus v. Baptist Medical Center, 671 F.2d 1100, 1102-03 (8th Cir. 1982) (denying injunction where plaintiff had no reasonable expectation of reemployment).

Constructive discharge. Watts is clearly barred from relitigating his claim for "constructive discharge because that claim has already been rejected not once but twice by this court. Watts v. Marsh, No. 87-T-804-S " (m.d. ALA. May 11,1989) (Hobbs, j.).

Due Process. Watts cannot avoid the application of res judicata by recasting his claim as a due-process challenge. Watts's due process claim is based on his allegation that, prior to the hearing on his termination, the Army circulated an inflammatory rumor charging Watts with advocating rape. Watts presented this same allegation to the district court during his first suit in which he charged the defendants with violating Title Vii and sought general review of his termination pursuant to 5 U.S.C.A. §§ 7702, 7703.

Claims not raised in Watts's complaint. in the briefs filed with this court , Watts's discusses two claims that he raised before the EEOC but omitted from his compliant in this case. Because all

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7. A plaintiff may recover for constructive discharge if he demonstrates that he was forced to resign because the defendant contrived to make his working conditions intolerable. The eleventh Circuit found that Watts's actual discharge undermined his claim for "constructive" discharge:

"Watts does not state a constructive discharge claim because he did not resign for the reason that his working conditions were so intolerable that he was forced to resign[; on the contrary,]

Watts was terminated after he was convicted in a federal court of harassment based upon his striking his supervisor."
Watts v. Marsh, No. 89-7546 (11th Cir . June 26,1990) (per curiam)

parties appear to have assumed that these claims are at issue in this case and because all parties have briefed the merits of these claims, the court will address the claims.

First , Watts claims that the Army discriminated and retaliated against him when it deducted from his paycheck an amount to cover a travel voucher already settled. assuming that Watts has established a prima facie case of discrimination and retaliation, the defendants have articulated legitimate, nondiscriminatory reasons for the deduction and the delay. The defendants offer three reasons . First, they contend that the delay arose because the first two or three vouchers Watts filed were incorrect or incomplete; on each occasion , the voucher was returned to him with a request that he resubmit a corrected voucher. Second, the defendants point out that Watts departed from the terms of the original voucher by renting a car. They contend that this exacerbated the delay in processing the voucher because Watts's supervisor had to modify the travel orders retroactively to account for the car rental. Finally, the defendants claim that it is normal Agency practice to withhold the amount of a voucher from an employee's pay when an employee has recieved an advance payment for travel expenses, as Watts did in this instance, fails to submit a voucher coon after completion of travel.

Watts attempt to reveal these reasons as pretextural is unsuccessful. Watts alleges that no such deductions were made form the pay of white employees even in cases where the employees delayed filing a voucher. He also claims that , in the

past, the need for retroactive modification of travel orders had not been cause for delay and he further alleges that whites who departed from their travel orders did not run into these problems. Apart from identifying FICA and Young as two examples of where employees who allegedly departed from travel orders without objection, however, Watts has provided no further explanation for his broad assertions.

[*Note added* Plaintiif's Exhibit 18 included all orders (50+), expenses and travel orders showing such facts as he was the only non-white employee and another black later added did not travel} . Vague allegations and conjecture are insufficient to establish that the legitimate reasons provided by the Defendant are mere pretext.

Watts's second claim concerns the Army's refusal to pay him for overtime hours. He claims that he was forced to take compensatory time-off instead of being paid for overtime hours while white employees were paid for there overtime work . In response, the defendants have submitted the testimony of Watts's supervisor that, during the time period in question , the army determined that all professional employees would be required to take compensatory time instead of paid overtime. The only individual Watts identified who received compensation for her overtime work was a clerical employee, not a professional ; under the terms of the Fair Labor Standard Act, the Army was required to pay this and other clerical employees for any overtime hours.[8] See 29 U.S.C.A. § 213 (exempting

professional employees from requirements of § 207.

8. Watts asserts that as a GS level 9 employee *note added{GS861-09 engineer,and GS 07 during a portion of such period] he was not exempt from the requirements of § 207. The court is unable to weigh the merit of this claim because Watts has failed to submit to the court the exhibit referenced in his brief or any other material which would shed light on this claim. * note added{ px 4,7 are 50 pages of individual pay records showing overtime pay of individuals at such times, PX 16 that the court had such difficulty finding includes the Labor investigators explanation of Plaintiff'exemption during investigation of the underlying complaint , pp50 of 65 Docket 3 03-85-162-E " Now under Title V overtime there is a pay level cut off, which I believe is step 10 of grade 10. Any level below that , if management orders overtime , then management is required to pay overtime unless the employee specifically requests comp time in lieu of over-time he was not exempt from the overtime requirements"}

Watts was unable to identify clearly any professional employees who received wages instead of compensatory time for overtime hours worked during this period. [9] {*note added:Px 4,7,56 show the pay (including OT,PX 23 is the Organization Roster showing names and positions},

Neverthe less, the court cannot grant summary judgment in favor of defendants on these two claims-- the travel voucher and overtime-compensation claims. By order entered on June 20, 1991, the court stayed all discovery in this cause. Watts has therefore not had an opportunity to engage in any reasonable discovery to rebut evidence offered by the defendants. The court will deny summary judgment as to these two claims.

B. Motions to Dismiss

The defendants seek dismissal of Watts's discrimination and retaliation claims to the extent that Watts asserts these claims under § 1981, §1985, and the fifth and fourteenth amendment as enforced through § 1983, on grounds that Watts's exclusive avenue for relief lies in Title VII. The court agrees that Title VII provides the exclusive remedy for employment discrimination suffered by federal employees. Brown v. GSA, 425 U.S. 820, 96 s. Ct. 1961 (1976) (Title VII pre-empts all other judicial remedies for federal employees); cf. Canino v. Unitred States E.E.O.C., 707 F.2d 468, 472 (11th Cir 19830) (discrimination prohibited by Title VII includes retaliation). A federal employee may not "circumvent[]...[the] careful and through remedial scheme Congress has created to remedy employment discrimination 'by the

simple expedient of putting a different label on the pleadings." Brown, U.S. at 833, 86 S.Ct.. at 1968. Watts's claims to the extent they are based on §§ 1981,1983, 1985 and the fifth and fourteenth amendments are therefore to be dismissed.

9Watts conceded at his deposition that "at that time [he] was not really aware [note added- could not immediately recall]of what was going on with the other engineering personnel." Watts knew of only one white of his grade level who worked overtime, and admitted that he did not know whether that employee was paid or received compensatory time.

Since his deposition, Watts has identified a white employee, Longchamp, who allegedly occupied Watts's same grade level yet received wages for overtime work. Watts's exceedingly vague description of this employee's position and responsibilities does not indicate why this employee is "similarly situated" within the meaning of Title VII. [* note added- Longchamp is clearly identified on the organization roster at PX 23 as a professional employee in the same unit who had been promoted to GS-12 as of 2/27/86
despite entering as a GS 7 and after Watts, PX 4,7,56 shows pay including overtime was paid to various members of such group at such times- virtually all other employees being white.}

Accordingly it is the ORDER,Judgment and Decree of the court that the motion for summary judgment and motions to dismiss, filed by defendants on April 24,May 29, and July 22,1991, be and they are hereby granted as to all claims filed by plaintiff Berman J. Watts, with the exception of his "time-travel" voucher and "overtime-compensation" claims to the extent these two claims are based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 2000e through 2000e-17; this cause will proceed as to these two claims, but with leave to the defendants to renew their motion for summary judgment as to these two claims after there has been reasonable discovery.

It is further ORDERED that the parties are allowed 45 days to engage in discovery as to only these two claims.

DONE, this the 9th day of April, 1992.

SIgned Myron Thompson
UNITED STATES DISTRICT JUDGE

6.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA SOUTHERN DIVISION

BERMAN J. WATTS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	91-T-146-S
MICHAEL P. W.STONE, et al.,	)	
	)	
Defendants.	)	

ORDER

This case is now before the court on the plaintiff's Motion for Order to Compel Discovery[1]. In support of his motion , the plaintiff raises the *same grounds* that he had raised in at least two prior motions, both of which were denied. The plaintiff has also raised the same grounds in two status conferences with the defendants before the undersigned judge.

In denying the previous motions to compel production of the same documents which are the subject matter of the instant motion , the court has made every effort to explain to the plaintiff that defendants cannot be compelled to produce documents which they allege are nonexistent.[2] In an earlier discovery dispute , the court required the defendants to file their responses to the plaintiff's discovery requests to determine whether , and to what extent , they reasonably answered the plaintiff's inquiries. On 7 August 1992, the defendants compiled. In their responses,

1.In the same pleading , the plaintiff moves the court for an order granting summary judgment. That motion has been denied in a separate order issued on 3 November 1992.

2.The plaintiff appears *pro se*, and , in an attempt to afford him wide latitude in making discovery requests, the court has indulged his repeated filings of the same motion s to an extent well beyond the tolerable limits for a lawyer.

the defendants specifically advised the plaintiff of the precise circumstances under which an employee's form 1588 "may be incomplete". They also advised the plaintiff' that these forms were computerized " and that"[in]n the ensuing years , the computer system has gone down several times and much information was destroyed". In addition, the defendants made the following representation regarding the travel vouchers which plaintiff requested:

" Travel vouchers. are maintained at the installation for 1 year; consequently, no vouchers from the relevant period are still maintained in the regular course of business at Fort Rucker. Defendant has located copies of several vouchers maintained in a separate file and will produce these vouchers in accordance with the offer made in this response. To the extent any exist they are maintained for three years at Defense Finance and Accounting at Fort Benjamin Harrison, Indiana, and the Federal Records Center in Dayton, Ohio. Defendant is making inquiries to determine whether any responsive vouchers are still in existence or accessible."3

Thereafter, in a status conference held on 21 August 1992, this court , this court directed the defendant's to advise the plaintiff on or before 24 August 1992 that all existing documents (including forms 1588 and TRAMIS sheet (overtime records)) were at Fort Rucker for his review within thirty days thereafter. On 31 August 1992, the

3. The plaintiff filed his administrative EEO complaints in January , 1986; thus , all of the relevant forms 1588 and the TRAMIS sheets were created before that date.

4.These are forms upon which payment for government travel is recorded. TRAMIS sheets are also government forms which record overtime pay to employees.

court ordered the plaintiff to examine and inspect the documents before 25 September 1992. On 21 September, before he traveled to Fort Rucker to view documents, the plaintiff filed yet another motion to compel production, objecting to the "claimed loss of Form 1588 records of the subject period as lost due to computer failures a certifiable response". In essence, the plaintiff harbors suspicions , for which he admittedly has no supporting evidence, that the defendants actually lost the documents via computer default. In spite of the court's many attempts to explain to the plaintiff that his suspicions do not warrant a different outcome his motions to compel,5 he persists in filing them.

Accordingly, it is the finding of this court that the defendants have produced for plaintiff's inspection all available forms 1588 and TRAMIS sheets in response to his request for production . For all of the foregoing reasons, it is ORDERED that the plaintiff's motion to compel discovery filed on 30 October 1992, is DENIED. It is further ORDERED that any further motions to compel discovery of computer forms 1588 and TRAMIS sheets in this case be STRICKEN from the record. The clerk is DIRECTED to return such motions to the plaintiff.
DONE this fifth day of November, 1992.

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5 At the most recent status conference held on 20 October 1992 with the plaintiff and defense counsel, the undersigned judge again reviewed with plaintiff the futility of questioning the

defendants' *good faith* in representing the availability of documents in the absence of evidence to the contrary. The court obviously erred in it's belief that the plaintiff understood the principle._n